Supreme Court, U.S.
FILED
OCT 24 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. 672

JOE H. TONAHILL,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY TO BRIEF OF THE RESPONDENT IN OPPOSITION

CLARK, THOMAS, HARRIS,
DENIUS & WINTERS
MARY JOE CARROLL
P. O. Box 1148
Austin, Texas 78767
A/C 512 472-8442
Of Counsel

SANDER W. SHAPIRO
P. O. Box 1148
Austin, Texas 78767
A/C 512 472-8442
Counsel of Record

Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002

INDEX OF AUTHORITIES

CASES	Page
Agoranos v. United States, 409 F.2d 833 (5th Cir. 1959), cert. den., 396 U.S. 824	7
Biggs v. United States, 246 F.2d 40 (6th Cir. 1957)	9, 10
Cohen v. United States, 405 F.2d 34 (8th Cir. 1968), cert. den., 394 U.S. 943	8
Evans v. United States, 377 F.2d 535 (5th Cir. 1967)	9
Feichtneir v. United States, 389 F.2d 498 (9th Cir. 1968)	8
Grant v. United States, 291 F.2d 227 (2nd Cir. 1961), vacated on another ground, 369 U.S. 401	5
Hensley v. United States, 406 F.2d 481 (10th Cir. 1968)	8
Kohatsu v. United States, 251 F.2d 898 (9th Cir. 1965), cert. den., 384 U.S. 1011	9
Mansfield v. United States, 381 F.2d 961 (7th Cir. 1967), cert. den., 389 U.S. 1015	8
Morgan v. United States, 377 F.2d 507 (1st Cir. 1967)	7
Prudden v. United States, 424 F.2d 1021 (5th Cir. 1970)	1, 3, 6, 11
Schlinsky v. United States, 379 F.2d 735 (1st Cir. 1967), cert. den., 389 U.S. 920	8
United States v. Agy, 374 F.2d 94 (6th Cir. 1967)	8
United States v. Frank, 245 F.2d 284 (3rd Cir. 1957), cert. den., 355 U.S. 819	9
United States v. Harrison, 265 F.Supp. 660 (D.C.N.Y. 1967)	10
United States v. Maius, 378 F.2d 716 (6th Cir. 1967), cert. den., 389 U.S. 905	8
United States v. Mancuso, 378 F.2d 612, 619 (4th Cir. 1967), cert. den., 390 U.S. 955	7

CASES	Page
United States v. Miranda, 422 F.2d 150 (6th Cir. 1970), cert. den., 399 U.S. 910	4, 5, 7
United States v. Neves, 269 F.Supp. 159 (S.D. N.Y. 1967)	6
United States v. Remolif, 227 F.Supp. 420 (D.C. Nev. 1964)	6, 11
United States v. Sclasani, 265 F.2d 408 (2nd Cir. 1959), cert. den., 360 U.S. 918	9
United States v. Turzynski, 268 F.Supp. 847 (D.C. Ill. 1967)	10
United States v. White, 417 F.2d 89, 91 (2nd Cir. 1969), cert. den., 397 U.S. 912	7
Zacher v. United States, 227 F.2d 219 (8th Cir. 1955)	9

UNITED STATES CONSTITUTION	
Fourth Amendment	3
Fifth Amendment	3
Sixth Amendment	3

RULES OF THE UNITED STATES SUPREME COURT	
Rule 24	1

IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. 672

JOE H. TONAHILL,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit

---

PETITIONER'S REPLY TO BRIEF OF THE RESPONDENT IN OPPOSITION

Major considerations prompt utilization of the privilege granted to the Petitioner by Rule 24, paragraph 4, of the Rules of this Court. By order dated October 12, 1970, this Court denied application for writ of certiorari to review *Prudden v. United States*, 424 F.2d 1021 (5th Cir. 1970). The brief in opposition relies heavily on that

ruling but ignores and, thus necessitates explanation of, significant and controlling distinctions between *Prudden* and the decision subject to review here.

As Petitioner has previously pointed out (Pet., p. 6), a major distinction between *Prudden* and this case is that in *Prudden* the government, as appellant, placed in issue the sufficiency of the evidence to sustain the trial court's fact findings of fraud, trickery and deceit while in this case the judgment of the trial court recites that counsel for the government admitted that the behavior of the Internal Revenue agents constituted fraud, trickery and deceit (Pet. A-5), and neither that fact finding nor any other upon which the district court decision rested was placed in issue on appeal.

The court of appeals decided *Prudden* by setting aside the district court's ultimate fact finding of fraud, trickery and deceit and by concluding that the evidence had been voluntarily and knowingly given by the taxpayer to the agents. In the decision here before this Court, an entirely different issue had been raised. The position of the government here was that evidence is not inadmissible even though secured from the taxpayer by admitted fraud, trickery and deceit on the part of the revenue agents. The decision in *Prudden* does not support such an argument, nor does this Court's denial of certiorari in the *Prudden* case indicate that a like ruling should be made here. Indeed, denial of certiorari in the instant case could cause the lower courts to conclude, as the Government contends, that agents can use fraud, trickery and deceit, immune from the right of suppression.

Although the brief in opposition filed in this Court contains no reference thereto, the government, as appel-

lant in the Court of Appeals admitted to "deceit practiced by the agents in emphasizing the civil, and de-emphasizing the criminal, aspects of the case" (Brief, p. 7). The deceit was defended by contentions that "deceit practiced by law enforcement officials, in and of itself, is not enough to warrant suppression of confessions or admissions; confessions and admissions are not rendered inadmissible merely because they are procured by deceit, trickery or fraud" (Brief, p. 7); "deceit, in and of itself, is not enough to warrant suppression of a confession" (Brief, p. 19); "the use of strategems, trickery, misrepresentations and deceit by an investigator is neither unconstitutional nor illegal per se"; and that "a confession is not rendered inadmissible merely because it was procured by deceit, trickery or fraud" (Brief, p. 20). Even in *Prudden*, the Fifth Circuit "explicitly reject[ed] the government's contention that the agents were free to use fraud, deceit, or trickery," and pointed out that "in cases where the IRS agents are obtaining consent to examine documents, they cannot gain such consent by affirmatively misrepresenting the nature of the search" (424 F.2d 1032, Ftn. 21; Pet. A-37). In the decision here subject to review, the court, because of the government's admissions, necessarily must be found to have held that the absence of any warning whatsoever may be coupled with fraud, trickery and deceit of the agents.

It should be pointed out that Petitioner's motion to suppress was grounded on the Fourth, Fifth and Sixth Amendments to the Constitution of the United States, any one of which should have been grounds for suppression. The Government, on the other hand, argues in effect that the Fourth Amendment rights do not apply, and that

a taxpayer has no right to Fifth Amendment protections unless he can also claim Sixth Amendment protections. If taxpayer is not in custody, he need not be warned of his right to counsel under the *Miranda* rule; therefore, according to the Government, he need not be warned of his right to keep silent. The Government's contentions are inconsistent with the vast majority of tax cases concerned with the issue.

The courts seem to say that advice as to the right to counsel becomes imperative only when the defendant is under custodial interrogation. The right to be warned that a person might be incriminating himself — that a criminal investigation is being conducted and he has a right to keep silent — these warnings are required whether or not custodial interrogation is involved. The distinction, while not articulated, is obvious. A suspect questioned in his own store, if he is warned that a criminal investigation is in process, has at least the freedom to telephone his lawyer and remain silent until his lawyer arrives. If he is in custody, the authorities must inform him of his right to telephone.

The distinction is nowhere more valid than in the case here before the Court. Petitioner, being a lawyer, would have known immediately to call a lawyer experienced in tax matters and to remain silent until the lawyer arrived if he had been told he was being investigated for the commission of a crime. His knowledge in this regard would be of no benefit to him unless he also knew that he was involved in a criminal investigation. Until he was so informed his knowledge of what to do in a criminal investigation was worthless to him. The decision below stands alone in presuming a waiver of

constitutional rights and holding admissible evidence obtained from a taxpayer without any warning whatsoever. Whether the warning is required by *Miranda* and *Escobedo*, it is nevertheless required.

Each of the decisions cited by the government, as well as many other decided cases, is, therefore, clearly reconcilable with the established general rule that the advice as to the privilege against self-incrimination is not dependent upon custodial investigation. The decision below does not purport to find that Petitioner voluntarily and understandingly waived his constitutional rights; instead, the decision assumes waiver by placing upon the taxpayer the burden of proving circumstances constituting an absence of waiver. None of the cited cases so holds; all indicate that the warning against self incrimination must be given, and that the Government has the burden of proving that the information was obtained lawfully—after due warning, and without fraud, treachery and deceit.

In *Grant v. United States*, 291 F.2d 227 (2nd Cir. 1961), *vacated on another ground*, 369 U.S. 401, the taxpayer had been warned at least to the extent that an Internal Revenue agent had told him "that what they were trying to do was to put him in jail" (291 F.2d 229) and had been informed by another agent that "you don't have to give me this information" (291 F.2d 228). Petitioner was neither so warned nor so advised. Moreover, in *Grant* the trial court had found "that there was nothing to show any affirmative misrepresentations, fraud, deceit, or scheme to defraud" while the trial court in the case at bar found, and the government admitted to, affirmative fraud, trickery and deceit on the part of the Internal Revenue agents.

In *United States v. Remolif*, 227 F.Supp. 420 (D.C. Nev. 1964), the trial court found that "defendants were informed by agents of the Internal Revenue Service of possible criminal implications in the investigation"; that "consent . . . to the examination of the books and records . . . was voluntarily and understandingly given" and that "consent was not obtained by fraud or misrepresentation" (227 F.Supp. 442). Contrary findings were made by the trial court here. In *United States v. Neves*, 269 F.Supp. 159 (S.D.N.Y. 1967), the court found that there was no fraud and that the Internal Revenue agents had "warned the defendant that anything he said could be used against him" and advised that "he did not have to answer questions or submit records tending to incriminate him" (269 F.Supp. 160). Here the government has admitted fraud and conceded that no warnings of any sort were ever given to the Petitioner. In *United States v. Prudden*, 424 F.2d 1021 (5th Cir. 1970), *cert. den.*, No. 453, this Term, it was the taxpayer himself who had initiated the contact with the agents for the Internal Revenue Service. In summarizing the facts "most favorably to the taxpayer," the court there pointed out that "Prudden telephoned Lexow at the Palm Beach office of the Internal Revenue Service from his home in Connecticut, stating that he was a director of FCA. He inquired if Lexow's examination was to cover FCA alone or its subsidiaries also, and further asked if the examination was routine. Lexow replied that the examination would cover both FCA and its subsidiaries and that it was not routine" (424 F.2d 1022, Pet. A-17). Not even that minimal warning was given to Petitioner by the revenue agents who approached him. Moreover, the taxpayer in *Prudden* consistently "refused" to produce certain records for the

government agents (424 F.2d 1021, Pet. A-20), thus establishing his knowledge that he was not required to provide evidence and his voluntary action in making other records available.

In *Morgan v. United States*, 377 F.2d 507 (1st Cir. 1967), the taxpayer "was warned by the agents of his right to remain silent, and that anything he said might be used against him. . . . The defendant makes no assertion, nor could he, that he was not free to walk out of the internal revenue office at any time. Nor is there any suggestion of trickery or fraud." In *United States v. White*, 417 F.2d 89, 91 (2nd Cir. 1969), *cert. den.*, 397 U.S. 912, the taxpayer was told "that he was not required to answer any questions or turn over any personal records." In *United States v. Mancuso*, 378 F.2d 612, 619 (4th Cir. 1967), *cert. den.*, 390 U.S. 955, the agent "advised the defendant 'that under the Constitution of the United States he may refuse to answer any question the answer to which will tend to incriminate him' "; moreover, the taxpayer had been convicted under the net worth theory rather than upon the basis of evidence which he himself had provided to the agents. Similarly, in *Agoranos v. United States*, 409 F.2d 833 (5th Cir. 1959), *cert. den.*, 396 U.S. 824, the taxpayer had been convicted under the net worth theory rather than upon the basis of evidence asserted to have been unconstitutionally obtained from him. In *United States v. Miranda*, 422 F.2d 150 (6th Cir. 1970), *cert. den.*, 399 U.S. 910, the circuit court affirmed the trial court's holding based upon findings that the agents had warned the taxpayer that he "was not required to answer any questions . . . or give any information," that the taxpayer stated that he understood, and that "all

statements made and all documents delivered were voluntary acts of the appellant and were not induced by stealth, trickery or misrepresentation" (310 F.Supp. 217, 220-222).

In *Cohen v. United States*, 405 F.2d 34 (8th Cir. 1968), *cert. den.*, 394 U.S. 943, the taxpayer was advised that he need not answer any questions which tended to incriminate him"; the taxpayer said "that he understood"; the "warning was repeated"; the taxpayer received "a letter which told him that he could bring an attorney". In *Feichtneir v. United States*, 389 F.2d 498 (9th Cir. 1968), after the case was referred to a special agent, "appellant obtained counsel who was present at subsequent conferences"; objection to "the admission of exhibits obtained by the special agent from appellant with his counsel's permission is groundless." In *Hensley v. United States*, 406 F.2d 481 (10th Cir. 1968), the "only evidence obtained from the appellant which was introduced at the trial was corporate records and a natural person may be required to furnish the corporate records irrespective of the fact that such records might tend to incriminate him; . . . no evidence was used by the prosecution which an accused, fully aware of his constitutional rights, could have prevented the government from obtaining or introducing."

To this effect also are *Schlinsky v. United States*, 379 F.2d 735 (1st Cir. 1967), *cert. den.*, 389 U.S. 920; *Mansfield v. United States*, 381 F.2d 961 (7th Cir. 1967), *cert. den.*, 389 U.S. 1015; *United States v. Maius*, 378 F.2d 716 (6th Cir. 1967), *cert. den.*, 389 U.S. 905. See also *United States v. Agy*, 374 F.2d 94 (6th Cir. 1967), holding that statements made before warning were inadmis-

sible: *Kohaisu v. United States*, 251 F.2d 898 (9th Cir. 1965), *cert. den.*; 384 U.S. 1011, holding that statements admissible on the basis of warning shortly after criminal investigation instituted; and *Evans v. United States*, 377 F.2d 535 (5th Cir. 1967).

In *United States v. Sclasani*, 265 F.2d 408 (2nd Cir. 1959), *cert. den.*, 360 U.S. 918, the Court of Appeals affirmed the trial court's finding that the taxpayer's "original permission was freely given in response to a fair and accurate warning" and that there was no fraud or trickery on the part of the government's agents (265 F.2d 415). The conviction was upheld upon the basis of "net worth independently proved by the government" (265 F.2d 412).

In *United States v. Frank*, 245 F.2d 284 (3rd Cir. 1957), *cert. den.*, 355 U.S. 819, the government proved its case by the bank deposits-expenditure method and for corroboration used the net worth method. The trial court had found that no fraud was practiced by the government agents (151 F.Supp. 864).

In *Biggs v. United States*, 246 F.2d 40 (6th Cir. 1957), the court found that the evidence was "voluntarily given to a revenue agent in a civil tax investigation without promise of immunity and in the absence of fraud and misrepresentation" (246 F.2d 44).

In *Zacher v. United States*, 227 F.2d 219 (8th Cir. 1955), the court quotes the warning which was given to the taxpayer and his response that he "felt free to answer these questions". (227 F.2d 225). The court therefore found that the evidence had been voluntarily and knowingly supplied by the taxpayer.

No case cited by the government denies a motion to suppress, or approves a conviction upon the basis of, evidence secured from the taxpayer without warning or indication of knowledge and understanding of criminal prosecution on the part of the taxpayer. Where the taxpayer, as here, was never advised of his right to remain silent or told that a criminal investigation had been instituted, the courts have held that the evidence should be suppressed. *United States v. Turzyński*, 268 F.Supp. 847 (D.C. Ill. 1967); *United States v. Harrison*, 265 F.Supp. 660 (D.C.N.Y. 1967). Here the absence of warning was coupled with admitted fraud, trickery, and deceit.

In its brief in opposition in this Court the government does not continue its previous defense of fraud as a means of securing evidence, but neither does it attempt to retract the prior admissions of fraud. Instead, it seeks to defend the decision below by a charge that Petitioner has confused findings of fact with conclusions of law in his claim that the decision below rests upon an unwarranted rejection of the district court's findings of fact. The findings of fact to which the argument had been directed were, of course, those in which the trial court found "affirmative fraud, trickery and deceit" (Pet. 22-23). No authority whatsoever is cited for the contention that "affirmative fraud, trickery and deceit" are "conclusions of law." The government's assertion to that effect is contradicted even by the decisions relied upon in other arguments. For example, in *Biggs v. United States*, 246 F.2d 40 (6th Cir. 1957), the court explicitly held that "[w]hether the books were voluntarily surrendered by the appellant or were obtained under a promise of im-

munity or through fraud or misrepresentation on the part of the Government is a *question of fact*" (246 F.2d 44; emphasis added). In *United States v. Remolif*, 227 F. Supp. 420, 425 (D.C. Nev. 1964), although the motion to suppress was denied, the court, because of a dispute as to whether or not fraud, misrepresentation or trickery vitiated the consent, ordered the issue to be submitted to the jury. In *Prudden*, upon which the government heavily relies on all other points, the court, citing cases on the "clearly erroneous" test, reached the conclusion "that the ultimate *fact finding*—fraud, trickery and deceit by the agents—is a mistaken one" (424 F.2d 1031; Pet. A-35-36), and, after an exhaustive review of the evidence relied upon by the taxpayer (424 F.2d 1031-1035; Pet. A-35-44, emphasis added), set aside the "fact determination" of the trial court.

The decision below, thus, sets aside in a trial court judgment that which the same court had previously designated to be a "fact finding—fraud by the agents." That ruling was made without regard to the "clearly erroneous" test and in spite of the fact that the government had not contested the trial court findings of fact. Here the trial court not only found fraud on the part of the agents but also found that "[e]ven the Government's counsel admits that such behavior [that previously described in the opinion and nowhere disputed by the government either in the Circuit Court or in this Court] constitutes fraud, trickery and deceit" (Pet. A-5).

In essence, therefore, the government, by its brief in opposition, is here seeking this Court's denial of certiorari and, thus, the opportunity to base prosecution of Petitioner

on evidence not only obtained without warning but even admittedly secured by "fraud, trickery and deceit" on the part of the revenue agents.

Respectfully submitted,

SANDER W. SHAPIRO
P. O. Box 1148
Austin, Texas 78767
A/C 512 472-8442
Counsel of Record

CLARK, THOMAS, HARRIS,
DENIUS & WINTERS

MARY JOE CARROLL
P. O. Box 1148
Austin, Texas 78767
A/C 512 472-8442
Of Counsel